



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

# HARVARD LAW REVIEW

---

VOL. XXX

DECEMBER, 1916

NO. 2

---

## IS THE RIGHT OF AN ASSIGNEE OF A CHOSE IN ACTION LEGAL OR EQUITABLE?

THE interesting article by my friend, Professor Cook, in a recent number of this REVIEW,<sup>1</sup> on the alienability of *choses* in action leads me to make some suggestions in opposition to his argument that the assignee of a *chose* in action should be regarded as having a legal rather than an equitable right. Perhaps most lawyers would agree with him offhand, but I think generally without appreciating the full implications of their conclusion.

In discussing equitable rights there is always danger of confusion between the essential character of the right and the tribunal in which it is enforced. The fundamental characteristic of an equitable obligation is that it binds primarily a particular person, and binds others only when their relation to that person is such that in conscience they should be subject to his duties. The Court of Chancery has been the tribunal where such duties have ordinarily been enforced. But even in jurisdictions where the distinction between legal and equitable courts is still preserved, courts of law to-day enforce a great variety of equitable rights and duties without thereby changing their essential characteristics. To call such rights legal in antithesis to equitable merely because a court of law enforces them, is a natural tendency but a dangerous one. Of course no such confusion exists in the argument of Professor Cook. His view seems to be that the extent of the powers of the assignee

---

<sup>1</sup> 29 HARV. L. REV. 816.

of a *chose* in action involves the conclusion that he has more than that personal right which is typical of equitable ownership and should rather be designated as a legal owner, his ownership being qualified, to be sure, by certain limitations, as legal ownership often is.

Though legal ownership is conceived fundamentally as a right good against all the world, actual instances of such ownership are often much more narrowly limited. The owner of a chattel which has been stolen from him is likely to find his right against the world considerably qualified if the thief is in a place where the principles of market overt prevail. In the law of sales of chattels, the legal title passes to the buyer, without transfer of possession, if the parties so intend; yet in many jurisdictions the seller in possession can destroy the buyer's right by a resale, and even the seller's attaching creditors are often allowed a right superior to that of the buyer. On the other hand, where statutory provision is made for giving effective public notice of an equitable right, the equitable owner may acquire rights good against the world. The recording system thus enables one who has an equitable easement or other equitable right in real estate, based on contract, to protect himself against the world. It follows that one whose title is equitable may have in a particular case much more comprehensive ownership than another person who has a legal title. One who has a recorded contract for the transfer of Blackacre, especially if he has paid the price and the time for conveyance has come, has more comprehensive rights than the grantee under an unrecorded deed of Whiteacre who has not paid the price and whose estate is subject to a vendor's lien. Yet the former has an equitable and the latter a legal title.

Doubtless the reasons which have led to limitations of legal ownership have often been fundamentally the same as those controlling the habitual limitations of equitable ownership. In the case suggested above of a purchaser of a chattel without delivery, the reason why a purchaser in good faith from the seller in possession has been protected by courts of law, is the same reason which has led equity habitually to protect purchasers for value. The limitations set by recording statutes on legal titles have a similar foundation. Nevertheless, the methods by which such results are obtained at law and in equity are fundamentally different. The law achieves the result by imposing limitations on a title which would otherwise

be absolute. Equity achieves the result by extending to others, so far as is conscientious, an obligation which is primarily personal to one. It may be conceded that even this distinction of method is not always observed, and that instances may be found where equitable ownership is treated in a way analogous to legal ownership, but, nevertheless, the fundamental distinction exists.

Whether in a theoretical system of jurisprudence it is worth while to have two roads by which the same result may be achieved is rather beside the point in England and America, for we have the two systems and the roots of the equitable theory of ownership sink too deep to make it possible to tear them up. Moreover, an attempt to do so is likely to cause more confusion and incorrect conclusions than advantage in a body of law which has developed for centuries with the double system.

The history of the law governing the assignment of *choses* in action after the earliest periods is tolerably plain. The assignee possessed by implication a legal authority or power to enforce in the name and stead of the assignor the claim against the debtor. This involved no legal right to the claim itself.<sup>2</sup> He was further regarded in equity as the owner of the claim. If it were not for the first of these rights the assignee would have been obliged to resort to equity in every case to enforce the claim. If it were not for the second principle, his authority to collect might be disregarded or destroyed by the debtor's paying the assignor in spite of notice of the assignment, [by the bankruptcy of the assignor, or in other ways.

About the end of the eighteenth century courts of law recognized the equitable right of the assignee and gave the same protection to him that a court of equity would have done, still recognizing, however, that his ownership was equitable, not legal.<sup>3</sup>

---

<sup>2</sup> The assignee has often been called the agent of the assignor, but it has been pointed out that the assignee is acting on his own behalf and not for another. The criticism seems just, but so far as concerns the question here discussed, it is merely verbal. The owner of property, tangible or intangible, may give another the power or authority to reduce the property to possession and, by so doing and not before, to become the owner of it.

<sup>3</sup> In *Winch v. Keeley*, 1 T. R. 619 (1787), Ashurst, J., said: "It is true that formerly the Courts of law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a Court of equity; but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the

This condition of affairs continued so long certainly as the assignee was compelled to bring action against the debtor in the name of the assignor. So long as that procedure prevailed, it was hardly possible to argue, and it was not argued, that the assignee was the legal owner of the right. Yet, during this period, all the powers and rights upon which Professor Cook relies as showing a legal title on the part of the assignee were established. Every one of them dates back at least to the early part of the nineteenth century. The truth is that these powers and rights may belong to the assignee whether a court travels on the theory that he has a legal ownership or on the theory that he has a legal power to collect but only equitable ownership. Under such circumstances it is always safer to travel the path which the law has trodden instead of discovering another one which seems equally good for the purpose, unless it is very certain that the new path will enable us to reach not only most of the results which have been reached on the old one, but all, — or at least all which ought to be reached. Professor Cook, himself, calls attention to the fact that the equitable origin of the assignee's rights "must never be lost sight of if we are to understand the present state of our law."<sup>4</sup> The best way never to lose sight of this is to recognize that the assignee's ownership is still equitable; if it were not, there would be no danger for any one but a historian in losing sight of its origin.

But there are at least three classes of cases the proper decision of which seems to turn upon the answer to the inquiry whether the right of the assignee is still equitable as distinguished from legal ownership, namely cases involving:

1. The debtor's right to set off against the assignee claims against the assignor;
2. The effect of latent equities;
3. The effect of a subsequent total assignment on a prior partial assignment.

Professor Cook refers to two of these classes of cases, but postpones discussion of them. Had I not understood that this postponement was for a somewhat indefinite period, I should have delayed the expression of my views.

---

plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity?"

<sup>4</sup> 29 HARV. L. REV. 831.

1. The debtor is generally allowed to set off against the assignee not only claims existing at the time of the assignment, but those arising subsequently prior to the debtor's notice of the assignment.<sup>5</sup> On the other hand a claim against the assignor acquired after notice of the assignment cannot be set off.<sup>6</sup> There are a number of cases qualifying in one or another kind of case the right of set-off against the assignee, but the decisions need not be examined here, for all that is of importance to the present argument is that certainly everywhere the general rule is admitted that a claim matured at the time of assignment may be set off against the assigned claim. There seems no possible ground on which to support this general rule, except that the legal title to the assigned claim still is in the assignor, and that therefore when sued upon, the claim still is subject to set-off of a claim against him unless it is inequitable for the defendant to assert the right. It is certainly inequitable if the set-off was acquired after notice of the assignment, and it may be urged that it is also inequitable in any case for the defendant to assert his set-off when the real plaintiff in interest, whether the nominal plaintiff or not, is an assignee, unless the assignor is insolvent, since the defendant might collect his claim from the assignor who

<sup>5</sup> *Cavendish v. Geaves*, 24 Beav. 163, 174 (1857); but see *Stoddart v. Union Trust, Ltd.*, [1912] 1 K. B. 181; *Tuscumbia, etc. R. Co. v. Rhodes*, 8 Ala. 206 (1845); *Adams v. Leavens*, 20 Conn. 73 (1849); *Hall v. Hickman*, 2 Del. Ch. 318 (1864); *Guerry v. Perryman*, 6 Ga. 119 (1849); *Gardner v. Risher*, 35 Kan. 93, 10 Pac. 584 (1886); *Adams v. Webster*, 25 La. Ann. 117 (1873); *Hooper v. Brundage*, 22 Me. 460 (1843); *Collins v. Campbell*, 97 Me. 23, 28, 53 Atl. 837 (1902); *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898 (1883); *Hunt v. Shackleford*, 55 Miss. 94 (1877); *Ford v. O'Donnell*, 40 Mo. App. 51 (1890); *Lewis v. Holdrege*, 56 Neb. 379, 76 N. W. 890 (1898); *Sanborn v. Little*, 3 N. H. 539 (1826); *Wood v. Mayor*, 73 N. Y. 556 (1878); *First Nat. Bank v. Bynum*, 84 N. C. 24 (1881); *Metzgar v. Metzgar*, 1 Rawle (Pa.), 227 (1829); *Clement v. Philadelphia*, 137 Pa. 328, 334, 20 Atl. 1000 (1890); *Neal v. Sullivan*, 10 Rich. Eq. (S. C.) 276 (1858). See also *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146 (1915). *Cf. Greene v. Darling*, 5 Mason (U. S. C. C.) 201 (1868). So a particular credit item in a mutual account cannot be separately assigned. *Heiliger v. Ritter*, 78 N. Y. Misc. 264, 138 N. Y. Supp. 212 (1912).

<sup>6</sup> See cases *supra*, also *Campbell v. Equitable Life Assur. Soc.*, 130 Fed. 786 (1904). And the debtor, if he had notice of a proposed assignment of a claim against him, and did not inform the person proposing to take the assignment of an existing right of set-off against the assignor, cannot set it up against the assignee. *King v. Fowler*, 16 Mass. 397 (1820). Cases involving the question of the right of the maker of negotiable paper to set off against a transferee after maturity claims against the payee or indorsee, though often decided as if depending upon the same principle, should be distinguished, since even after maturity the legal title to the note is transferable. As to such cases see: 23 L. R. A. 327, n; 39 L. R. A. (N. S.) 658, n.

really ought to pay it. This limitation, however, of the debtor's right of set-off does not seem to have prevailed.<sup>7</sup> It seems rather to have been thought equitable for the debtor to be allowed to assert the right and thus to compel the assignee then to sue the assignor for reimbursement.

2. The effect of equities of third persons against the assignee seems also to depend upon the legal or equitable character of the assignee's rights. Though it is well settled that an assignee is subject to the equities of the obligor, it is a matter of dispute how far the assignee is subject to equities of third persons against the assignor; as, for instance, where the assignor was himself an assignee of the *chose* in action under an assignment which he had procured by fraud, or where for any reason the assignor held the assigned claim subject to a trust, actual or constructive, in favor of a third person. It would be everywhere agreed that an assignee who takes the assignment with notice of the claim against the assigned right, and still more clearly if he undertakes when the assignment is made to satisfy the claim, holds his right subject to the prior claim;<sup>8</sup> but even though the assignee paid value with no knowledge of any outstanding claim, it is still true that the defrauded original owner or person beneficially entitled to the assignment has an equity prior in time and, therefore, superior to that of the ultimate assignee, if the latter's right is merely equitable. If, however, the latter could be regarded as the owner of a legal right, his right would be superior to the original equity. In fact, the latent or collateral equity against the assignor of an intangible *chose* in action has prevailed over the right of the subsequent purchaser in good faith, in the absence of an estoppel, in England and in a majority of the United States where the question has been raised.<sup>9</sup> In

<sup>7</sup> See cases cited *supra*, n. 5.

<sup>8</sup> *Buffalo Glass Co. v. Assets Realization Co.*, 133 N. Y. App. Div. 775, 117 N. Y. Supp. 1087 (1909).

<sup>9</sup> *Cockell v. Taylor*, 15 Beav. 103 (1851); *Barnard v. Hunter*, 2 Jur. (N. S.) 1213; *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130 (1894); *Pearson v. Luecht*, 199 Ill. 475, 65 N. E. 363 (1902); *Brown v. Equitable Life Assur. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968 (1899); *Tripp v. Jordan*, 177 Mo. App. 339, 164 S. W. 158 (1913); *Bush v. Lathrop*, 22 N. Y. 535 (1860); *Cutts v. Guild*, 57 N. Y. 229 (1874); *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); *Central Trust Co. v. West India Improvement Co.*, 169 N. Y. 314, 62 N. E. 387 (1901); *Culmer v. American Grocery Co.*, 21 N. Y. App. Div. 556, 48 N. Y. Supp. 431 (1897); *State v. Hearn*, 109 N. C. 150, 13 S. E. 895 (1891); *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413 (1898); *Downer v.*

some States, however, the courts have followed an early statement of Chancellor Kent,<sup>10</sup> which is now overruled in New York,<sup>11</sup> to the effect that an assignee is not bound by equities in favor of third persons since, though he can make inquiries of the debtor before taking the assignment and thereby acquaint himself with any defences the debtor may have, no such procedure is possible in regard to equities of unknown third persons.<sup>12</sup> A distinction must be taken where the *chose* in action has a tangible form, especially if it is by law assignable. The assignment of an overdue negotiable promissory note though often likened to that of an ordinary *chose* in action does not properly involve such a discussion as is contained in this article. Even after maturity the transfer of such a note by the holder unquestionably transfers a legal title and though the circumstance that the transfer is after maturity puts the taker of the note on inquiry as to any defence the maker may have (since if he had had no defence the instrument would presumably have been paid) yet the fact that the instrument is overdue gives no reason to suppose that there are collateral equities affecting the transferor's title. In such a case, therefore, the *bonâ fide* purchaser of the note is protected.<sup>13</sup> A principle is applicable also to other *choses* in action having tangible form like certificates of stock, policies of insurance, non-negotiable bonds, somewhat similar to that which is

---

South Royalton Bank, 39 Vt. 25 (1866). See also *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 16 S. E. 942 (1892); *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885).

<sup>10</sup> In *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441 (1817). See also *Livingston v. Dean*, 2 Johns. Ch. (N. Y.) 479 (1817).

<sup>11</sup> See New York decisions stated *supra*, note 9.

<sup>12</sup> *First National Bank v. Perris Irrigation District*, 107 Cal. 55, 40 Pac. 45 (1895); *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25 (1848); *Duke v. Clark*, 58 Miss. 465 (1880); *Williams v. Donnelly*, 54 Neb. 193, 74 N. W. 601 (1898); *DeWitt v. VanSickle*, 29 N. J. Eq. 209 (1878); *Mifflin County Nat. Bank's Appeal*, 98 Pa. 150 (1881); *Huber's Assigned Estate*, 21 Pa. Sup. Ct. 612, 615 (1902). In a few of these decisions which relate to mortgages and judgments, it is not clear how far the court intended to lay down broadly a principle covering all non-negotiable *choses* in action.

<sup>13</sup> *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673 (1887); *Eversole v. Maull*, 50 Md. 95 (1878); *Etheridge v. Gallagher*, 55 Miss. 458 (1877); *Lee v. Turner*, 89 Mo. 489, 14 S. W. 505 (1886); *Neuhoff v. O'Reilly*, 93 Mo. 164, 6 S. W. 78 (1887); *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885); *Kernohan v. Durham*, 48 Ohio St. 1, 26 N. E. 982 (1891); *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463 (1892). See also *Combs v. Hodge*, 21 How. (U. S.) 397 (1858), and the argument in *POMEROY, EQUITY JURIS.*, § 707 *et seq.* But see *Foley v. Smith*, 6 Wall. (U. S.) 492 (1867); *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892).

applied to them when they are made the subject of gift. The owner of the document is regarded as possessing if not a kind of legal ownership to the *chose* in action represented by it, at least a legal ownership of a paper which necessarily accompanies legal ownership, and the lack of which is notice of an infirmity of title. Accordingly a *bonâ fide* purchaser of a certificate of stock,<sup>14</sup> a non-negotiable bond or note,<sup>15</sup> or a policy of insurance,<sup>16</sup> is preferred to one having an equitable right against his assignor. Furthermore, it has been held that a written assignment of a *chose* in action by one who seeks to avoid the assignment later on equitable grounds estops the claimant as against a *bonâ fide* purchaser who bought the *chose* in action on the faith of that writing.<sup>17</sup> An assignor who has no legal title but is a mere bailee of a non-negotiable tangible *chose* in action it need hardly be said can give no right even to a *bonâ fide* purchaser which can stand against the depositor's claim.<sup>18</sup>

3. It is almost, if not quite, universally admitted that a partial assignee has merely an equitable right. If then, the total assignee has a legal right, a subsequent total assignment prevails over a prior partial assignment. This monstrous result has actually been reached on this reasoning, under the Georgia Code, which is held

<sup>14</sup> Colonial Bank v. Cady, L. R. 15 A. C. 267 (1890); Ambrose v. Evans, 66 Cal. 74, 4 Pac. 960 (1884); Arnold v. Johnson, 66 Cal. 402, 5 Pac. 796 (1885); Otis v. Gardner, 105 Ill. 436 (1883). But see Taliaferro v. First Nat. Bank, 71 Md. 200, 214, 17 Atl. 1036.

<sup>15</sup> Rimmer v. Webster, [1902] 2 Ch. 163; Cowdrey v. Vandenburg, 101 U. S. 572 (1879); Adams v. District of Columbia, 17 Ct. Cl. 351 (1881); International Bank v. German Bank, 71 Mo. 183 (1879); Putnam v. Clark, 29 N. J. Eq. 412 (1878); Grocers Bank v. Neet, 29 N. J. Eq. 449 (1878); Combes v. Chandler, 33 Oh. St. 178 (1877); Taylor v. Gitt, 10 Barr (Pa.) 428 (1849). But see Blackman v. Lehman, 63 Ala. 547 (1879); Covell v. Tradesman's Bank, 1 Paige (N. Y.) 131 (1828); Patterson v. Rabb, 38 S. C. 138, 17 S. E. 463 (1892).

<sup>16</sup> Plummer v. People's Nat. Bank, 65 Iowa 405, 21 N. W. 699 (1884). But see Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968 (1899); Culmer v. American Grocery Co., 21 N. Y. App. Div. 556, 48 N. Y. Supp. 431 (1897).

<sup>17</sup> See Cowdrey v. Vandenburg, 101 U. S. 572 (1879); Campbell v. Brackenridge, 8 Black. (Ind.) 471 (1847); Thurston v. McLellan, 34 App. D. C. 294 (1910); Cochran v. Stewart, 21 Minn. 435 (1875); Moore v. Metropolitan Nat. Bank, 55 N. Y. 41 (1873); Mifflin County Nat. Bank's Appeal, 98 Pa. 150 (1881); State Bank v. Hastings, 15 Wis. 75 (1862). But see Owen v. Evans, 134 N. Y. 514, 31 N. E. 999 (1892); Central Trust Co. v. West India Improvement Co., 169 N. Y. 314, 324, 62 N. E. 387 (1901).

<sup>18</sup> Blackman v. Lehman, 63 Ala. 547 (1879); Midland Railroad Co. v. Hitchcock, 37 N. J. Eq. 549 (1883). See also Combs v. Hodge, 21 How. (U. S.) 397 (1858).

to give the total assignee legal ownership.<sup>19</sup> Whatever may be the necessity of the decision under the Georgia Code, the case would probably not be generally followed even in jurisdictions which allow or require an assignee of an entire claim to sue in his own name.<sup>20</sup>

The result of the three classes of cases just referred to may then be considered under the headings of what the law actually is, and of what it ought to be. As to the first it seems impossible to doubt that the great weight of authority supports results which involve the conclusion that the assignee's right is not legal but equitable; and this conclusion is supported also by decisions relating to the effect of statutes permitting the assignee to enforce his rights in his own name.

The statutes fall into several classes, providing respectively that,

1. An assignee under a written assignment may enforce his rights in his own name or at law. Under such a statute the effect of oral assignments is unchanged.

2. The real party in interest must be plaintiff in any litigation.

3. A *chose* in action is assignable so as to vest title therein in the assignee.

How far a particular statute works a change other than one merely of procedure, is open to argument in each case. It would seem certainly that a mere provision that the real party in interest must bring suit in his own name can effect only a change of procedure. As to statutes in a different form the matter is not so clear. The power of the legislature to make the assignee a legal owner must, of course, be conceded; but generally the change effected by modern statutes has been held procedural only and does not alter the substantial rights of the parties.<sup>21</sup>

<sup>19</sup> *King Bros. & Co. v. Central of Georgia Ry. Co.*, 135 Ga. 225, 69 S. E. 113 (1910). See also *The Elmbank*, 72 Fed. 610 (1896).

<sup>20</sup> In *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870 (1887); 117 N. Y. 320, 22 N. E. 1039 (1889), it was held after elaborate consideration, that a prior partial assignee prevailed over a subsequent assignee of the whole claim who took in good faith and without notice. The same result was reached in *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413 (1898). In *Bridge v. Connecticut Mut. Life Ins. Co.*, 152 Mass. 343, 25 N. E. 612 (1890), a prior partial assignee would apparently have been preferred over a subsequent total assignee had he not been guilty of laches.

<sup>21</sup> *Carozza v. Boxley*, 203 Fed. 673 (1913); *Glen v. Busey*, 5 Mackey (D. C.) 233 (1886); *Leach v. Greene*, 116 Mass. 534 (1875); *Beckwith v. Union Bank*, 9 N. Y. 211 (1853); *Myers v. Davis*, 22 N. Y. 489 (1860); *Fuller v. Steiglitz*, 27 Oh. St. 355, 358, (1875); *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584 (1895); *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969 (1909).

Consequently, whether an assignee can maintain an action in his own name, depends upon the *lex fori*, not the *lex loci contractus*. It is a matter not of right but of remedy.<sup>22</sup> Statements, therefore, which are occasionally found to the effect that complete legal ownership passes to the assignee of a legal *chose* in action,<sup>23</sup> must be regarded as exceptional and, if not clearly required by the terms of a particular statute in question, as opposed to the current of authority.

I am, however, more interested in what the law on the point ought to be than what the actual weight of authority may be; and, therefore, the most serious question is whether the decisions in the three classes of cases, of which I have spoken, are rightly decided.

As to the right of set-off, I think most persons will feel that it would be improper to allow one who had a claim subject to a set-off, to escape the set-off by selling his claim. The only way to prevent it is by subjecting the assignee to the set-off. Certainly I believe the general rule allowing the set-off to be used is a desirable one. In a system of law where the smaller of two mutual debts cancels the other *pro tanto*,<sup>24</sup> it would not be necessary to deny the assignee legal ownership of the assigned claim in order logically to reach this result; but in the common law a cross-claim is not payment or part payment of the original claim,<sup>25</sup> the right of set-off is

<sup>22</sup> *Joseph Dixon Crucible Co. v. Paul*, 167 Fed. 784 (1900); *Richardson v. New York Central R. Co.*, 98 Mass. 85, 92 (1867); *American Lithograph Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909 (1914); *Tully v. Herrin*, 44 Miss. 626 (1870); *Lodge v. Phelps*, 1 Johns. Cas. (N. Y.) 139 (1799); *Northwestern Mut. Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108 (1914).

<sup>23</sup> In *Fitzroy v. Cave*, [1905] 2 K. B. 364, 373, the Court said: "Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods." It is unfortunate that the idea expressed in *Walker v. Bradford Old Bank*, 12 Q. B. D. 511, 515 (1884), should not rather prevail, "section 25, sub-s. 6 of the Judicature Act, 1873, does not, in my view, give any new rights, but only affords a new mode of enforcing old rights." See also *Close v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81 (1911).

<sup>24</sup> It was an axiom in the later Roman law that set-off took place *ipso jure*. The meaning of this was disputed; one school maintaining that without any act of the parties the set-off took place at the instant of the coexistence of the two debts; the other school holding that such cancellation took place only when asserted by one of the parties. DERNBURG, *COMPENSATION*, 2d ed., 283. The former view finds expression in the FRENCH CIVIL CODE, Art. 1290, and even under the latter view, the assertion of a party, not a decree of court, is all that is necessary for cancellation. See SWISS CODE OF OBLIGATIONS, Art. 122-124. Under the German Code it is necessary that the claims shall have arisen out of the same legal relation. BÜRG. GESETZBUCH, § 273.

<sup>25</sup> In *Searles v. Sadgrave*, 5 El. & Bl. 639 (1855), to an action for money had and received, the defendant pleaded a tender of a certain sum, and the plaintiff made replica-

rather in the nature of a cross-action. Certainly it seems impossible to say, that it is a legal limitation of the claim, and if it is only an equity, it would be cut off by the assignment if the assignee became the legal owner of the claim.

Perhaps the chief reason (other than a blind revolt at the assertion that *choses* in action are not transferable when in fact they are transferred every day) why the view is advocated that the assignee of a *chose* in action acquires legal ownership is because thereby so-called latent equities against the claim would be cut off, and it is thought unfair to subject the assignee to equities which he is unable to discover. On the other hand, it is to be observed that intangible *choses* in action are not primarily intended for merchandising, as chattels are. The rule in regard to latent equities has no importance not only where negotiable paper is concerned, but where *choses* in action having tangible form like policies of insurance, savings bank books, or non-negotiable notes are in question. The delivery of the document will cut off the equity. If, therefore, the parties desire to put an obligation in a merchantable form they can (if they wish) do so, and can do so without making the obligation negotiable. For such property, then, as an intangible *chose* in action, I see little reason to prefer the assignee to a previously defrauded owner of the claim. Where the sale of property is a necessary function of commercial activity, it is socially desirable to protect the new purchaser at the expense of a former innocent victim; but the desirability of this policy seems limited to that class of property.

It is, however, because of its effect on partial assignments that I am chiefly opposed to such a development of the law as shall give the assignee the legal ownership of the claim. The enormous weight of authority is to the effect that a partial assignee has but an equitable right. While this rule persists it is impossible to deny that a subsequent total assignee if his ownership is legal will prevail over a prior partial assignment. I have called such a rule monstrous, and so it seems to me because, in effect, it destroys the value of partial assignments almost completely. To say that an assignee

---

tion that a larger entire sum was due from the defendant. To this the defendant rejoined that the plaintiff was indebted to the defendant in a sum equal to the whole of the larger sum except to the amount which had been tendered. On demurrer the rejoinder was held bad.

gets only what his assignor has at the time of the assignment, whether the qualification of the assignor's right is legal or equitable, patent or latent, is one thing; but to say that an assignee shall have only what his assignor shall choose to leave him in the future by making or refraining from making other assignments is totally destructive of the value of assignments if the assignee can do nothing to protect himself. This is the situation in the case in question, if total assignments give the assignee a legal title to the claim, for notice to the debtor will of course afford no protection against the kind of fraud here in question. Partial assignments I believe to be more numerous than total assignments of intangible *choses* in action, and of equal, if not greater, commercial importance.

It may be said that the difficulty could be avoided by holding that the partial assignee also had a legal right. It might be sufficient answer to this to say that the question of legal ownership of the total assignee would then best be deferred until the courts shall recognize that the partial assignee as well as the total assignee has a legal right; but there are objections to that solution even if it were possible. To hold that the partial assignee is the legal owner of a part of the claim as a separate entity is to subject the debtor to an indefinite multiplication of claims against him owned by individual creditors. The courts rightly do not seem prepared to take such a step. To hold that the partial assignee becomes a joint-owner with the assignor, as has been suggested in a recent Texas decision,<sup>26</sup> sounds plausible, but then as each one of joint owners of a contract right has the power of releasing or discharging the whole joint claim by receiving payment or otherwise, the partial assignee and the assignor have each a power very inconvenient for the other. This is not perhaps a necessary rule, but it happens to be the rule of the common law.

On the whole, therefore, it seems to me that the system worked out by the courts during several centuries, coupled with a statutory change in procedure allowing the assignee to sue in his own name, produces the most desirable results and best fits in place with other rules of our legal system.

*Samuel Williston.*

HARVARD LAW SCHOOL.

---

<sup>26</sup> *Hughes-Buie Co. v. Mendoza*, 156 S. W. 328 (1913) (Tex. Civ. App.).